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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

SUPPLEMENTAL BRIEF RE:
PRECLUSION & SANCTIONS TAKEN
UNDER ADVISEMENT ON APRIL 7, 2010

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits a supplemental brief prior on Defendant's motions for preclusion of evidence, sanctions including dismissal of the death penalty.

MEMORANDUM OF POINTS AND AUTHORITIES

On April 7, 2010, the parties argued several motions to this Court that were filed by the defense, to-wit: Motion to Preclude Late Evidence and Witnesses filed first filed on Feb. 5, 2010 and supplements thereto; Motion to Preclude Late Sorenson Testing filed Feb. 25, 2010; and supplemental briefs requesting the Court to preclude State's evidence consisting of testimony and opinions from experts Greg Cooper, Sy Ray, Erik Gilkerson, specified UBS emails, Girard phone records, identified bank records, DPS forensic reports and crime scene

1 diagrams. In addition, the Court has under advisement Defendant's motion to dismiss the
2 death penalty as a sanction for other allegations the State made late disclosure of evidence.

3 The thrust of all of the defenses pleadings and oral arguments are the State is guilty of
4 serial late disclosures, failure to disclose shoe print evidence in the possession of law
5 enforcement for a period of three (3) months, all of which has caused irrevocable prejudice to
6 the defendant that has violated his 6th Amendment rights.

7
8 **A. SHOE PRINT EVIDENCE.**

9 On April 7, 2010 the defense again alleged prejudice for the *late* disclosure of the
10 La Sportiva shoe evidence. The defense presented the same argument at hearing on March 2,
11 2010. The defense team claims prejudice is evident because they have no time to make any
12 necessary adjustments and preclusion of the evidence is the only appropriate sanction.

13 Under Rule 15.7 and the law in Arizona, the State has not been *late* in any disclosure to
14 the defense. The defense team has repeated the allegation of late disclosure so often in this
15 case, they have somehow persuaded this court that sanctions are now appropriate.

16 Rule 15.7(b) states the final deadline for disclosure "Unless otherwise permitted ...
17 shall be completed at least seven days prior to trial." The Court has not entered any other final
18 deadline for disclosure. This Court has set earlier disclosure deadlines directed to evidence in
19 the possession of the State at that time. The State complied fully with these orders.

20 The issue of the shoe impressions was not litigated until January 14, 2010. On January
21
22 27, 2010, less than two weeks later, the State discovered evidence that Defendant purchased a
23 pair of La Sportivas which appear to match the impressions left behind Carol's house and next
24 to the bicycle tire tracks. This information was disclosed on January 29, 2010. Defendant has
25 failed to demonstrate how particularized prejudice on evidence received months before trial.
26

1 The defense alleges prejudice because the State withheld a report until January 2010
2 that was issued by Mr. Gilkerson on or about October 22, 2009. For the first time in this case
3 Mr. Gilkerson indicated that some of the photographs sent for comparison months earlier "most
4 closely correspond to a La Sportiva shoe." At that point in time the State had no evidence
5 whatsoever linking the La Sportiva shoe to this case. It was not until the end of January that
6 the State was able to link this type of shoe to the Defendant. This was four (4) months before
7 trial!
8

9 While the prosecution must disclose any information
10 within the possession or control of law enforcement personnel,
11 *Imbler v. Craven*, 298 F.Supp. 795 (C.D.Cal.1969), *aff'd sub*
12 *nom. Imbler v. California*, 424 F.2d 631 (9th Cir.), *cert. denied*,
13 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104 (1970), it has no
14 duty to volunteer information that it does not possess or of
15 which it is unaware, *United States v. Goldberg*, 582 F.2d at
16 490.

17 *United States v. Chen*, 754 F.2d 817, 824 (1984).

18 When the State received the Gilkerson report in October, 2009, there was no way to
19 know whether it was favorable or unfavorable to the defense. More investigation needed to be
20 done to determine the applicability of the Gilkerson report to the State's case. When it was
21 discovered that the defendant had purchased a pair of La Sportiva shoes in 2006 all of the
22 information relative to the shoe print evidence was immediately disclosed. All of this occurred
23 months in advance of the trial. As there was no *Brady* violation, non-disclosure of material
24 which, up to that point, had no evidentiary value whatsoever, is harmless at best.

25 **B. THE STATE HAS NOT MADE LATE DISCLOSURES**

26 The State has not been *late* in the disclosure of any evidence in its possession or
under its control. The State has fully complied with disclosure under Rules 15. 1 and 15. 7.
However, from the questions directed by the Court to the State at the hearing on April 7,

1 2010, it appears this Court has bought into the defenses characterization that *late* is different
2 from what is contained in the Rules of Criminal Procedure.

3 The defendant has had notice of the State's evidence months before the trial. This
4 includes all of the computer evidence, the cell tower evidence, the specified emails, phone
5 records and identification of the State's experts. To punish the State under all of the
6 circumstances of this case would be contrary the laws of disclosure and unduly harsh to the
7 victims.
8

9 CONCLUSION

10 One must not forget this is a case where an innocent women in the prime of her life
11 was bludgeoned to death. All of the significant circumstantial circumstances point to only
12 one person, the defendant. There must be compelling evidence before this court proving the
13 State willfully failed to comply with the rules of disclosure. There is no such evidence.
14

15 If the court is persuaded to rule in favor of the defendant's, no jury will be able to
16 hear the truth on what happened on July 2, 2008. The remedy of preclusion of the evidence is
17 not warranted with the facts before this court.

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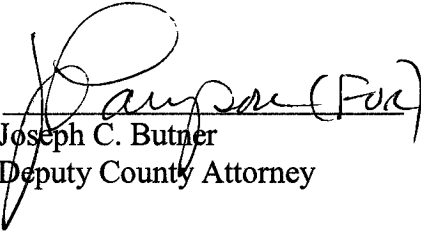
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RESPECTFULLY SUBMITTED this 8th, April, 2010.

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By:


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COPIES of the foregoing delivered this
8th day of April, 2010 to:

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